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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

DELLAWAR SAIDWAL,

Defendant and Appellant.

C085282

(Super. Ct. No. CRF167358)

Defendant Dellawar Saidwal was convicted of domestic violence-related charges. On appeal, he contends his rights were violated when he was required to appear in jail clothes during jury selection. He further argues his counsel was ineffective during voir dire and requests reversal based on cumulative error. Defendant also requests that we remand the case to permit the trial court to consider whether to exercise its discretion and strike his prior serious felony enhancement, pursuant to Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1–2). We will remand this case for the trial court to exercise its

discretion to strike the prior serious felony conviction enhancement. In all other respects, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The victim and defendant were married in 2000 and have four children together. In 2012, the victim met Homeland Security Special Agent Derek Derrick Osborne in connection with deportation proceedings for defendant after he was convicted of committing domestic violence in 2011. In 2011, defendant and the victim argued over the victim wearing nail polish, and defendant hit her on her head, causing her eardrum to rupture.

After the proceedings ended in 2013 with defendant not being deported, Osborne spoke with the victim three times. Each time, the victim would describe “ongoing problems” and ask about reopening deportation proceedings for defendant. She said she was afraid to contact the police because, if defendant was not convicted, he would return home and “possibly take it out on her.” The victim was also afraid defendant would take their children to Afghanistan or harm her family in Afghanistan.

In July 2016, the victim left Osborne a voicemail saying she wanted her husband arrested and needed help to “call the cops when he’s not there.” Osborne advised the victim about local programs for women seeking to leave abusive environments. Osborne testified at trial that the victim seemed “interested,” but was concerned about losing her subsidized low-income housing. The victim asked Osborne if he could guarantee that defendant would be prosecuted, but Osborne responded that was not possible. At trial, Osborne testified that, in his opinion, the victim was being truthful.

Trial Testimony

Throughout July and August 2016, the victim communicated with Osborne via phone and e-mail. In September 2016, Osborne met with the victim to discuss domestic violence programs. At trial, Osborne testified the victim seemed “extremely nervous”

and feared defendant would find out she was speaking to Osborne. The victim told Osborne she and defendant had recently fought over their application for subsidized housing. Defendant encouraged the victim to lie about his income, but the victim refused. Defendant grabbed the victim on her arm and tried to hit her, causing bruising. The victim told Osborne she had other bruises, but she refused to show them to him. The victim did not call police, reiterating her concerns that defendant would simply return home and take their children to Afghanistan. Osborne took photos of the victim's bruised arm, and she subsequently asked him to show them to a prosecutor. The photos were shown to the jury.

At trial, the victim testified that she lied to Osborne to get defendant in trouble so he would be deported. She did not like how often they argued, although he had not hit her since the 2011 incident. The victim testified the bruises on her arm in September 2016 were caused by a fall, and Osborne's partner told her Osborne would shred the photo of her bruised arm.

During trial, the prosecutor asked the victim about statements in a letter she wrote to Osborne in January 2016 regarding her argument with defendant over the subsidized housing application and the threats he made to her. The victim confirmed she had written that defendant encouraged her to lie about their income and that it was "okay to steal from the non-believers." She also wrote that, when defendant asked her to sign the application "or else," she asked what "else" meant. Defendant responded, "stop talking back to him and I have no rights to talk back to husbands as a wife because women don't have rights in Islam." The victim told defendant that was "not true." Defendant then gestured with his fists, threatened to break her teeth, and said she did not know who she was dealing with. During trial, the victim testified that she "overexaggerated" in the letter to get defendant in trouble. Defendant argued during trial that the victim exaggerated in an effort to get her husband deported.

Clothing Worn by Defendant During Jury Selection

Prior to jury selection, the court noted defendant was “dressed in jail clothing,” due to an “oversight” by defense counsel in not having “civilian clothing” available. The court asked defense counsel how defendant would like to proceed, and he responded, “For this morning, the Defendant is willing to be absent from the jury selection process while I try to get him some civilian clothes.” Defense counsel stated he intended to get defendant civilian clothes that afternoon. The court informed defendant he had the right to be present at all stages of the trial, unless he wished to be absent for any portion. Defendant responded that he wanted to stay.

The court then discussed the issue with defendant: “You want to be here in court? Okay. If you’re here in court, which is your absolute right, you understand you will be here wearing jail clothing, not civilian clothing. Do you understand that?” Defendant responded, “Yes.” The court asked, “And you wish to proceed even though you’re in jail clothing?” Defendant responded, “I want more clothes.” The court said, “You’re going to get civilian clothing, but it won’t be available until the afternoon. Do you understand?” Defendant responded, “Yes, Your Honor. That’s okay.” The court clarified, “Okay. So just so we’re clear, you -- if you wish, you don’t have to be here this morning. I understand you wish to be here, but -- so you will be here, but you’ll be in jail clothing, correct?” Defendant responded, “Yes.”

The court then instructed defense counsel to do his best to get defendant civilian clothing and asked if he “needed to talk to [defendant] about this any further?” Counsel responded, “No. I’ll go with his decision.” The court said, “Okay. He’s made his choice,” and defense counsel replied, “Yes.” The court offered to instruct the jury to not hold the jail clothing against defendant, and defense counsel responded, “Thank you.”

Before jury selection began, the court instructed the prospective jurors as follows: “You notice [defendant] is in jail clothing today. Please, it’s -- the fact that he’s in jail clothing should not be considered by you in any way, shape, or form in reaching a decision in this case. Obviously a person charged with a crime is arrested and brought to trial. And you should make a determination in this case based only on the evidence, not on what people are wearing.” Neither defense counsel nor defendant objected to the instruction.

When proceedings resumed after the lunch recess, the court pointed out to the prospective jurors that defendant was now wearing civilian clothing. Defendant was dressed in civilian clothing for the remainder of the trial.

While the court was discussing jury instructions with counsel, it noted it had “mention[ed] to the jury the first day that [defendant] was in a jail jumpsuit. He was not restrained by handcuffs or anything else, but he was in jail clothing for the first morning of jury selection; subsequently, [he] was in civilian clothing. And I told the jury not to give that any further consideration. It’s not evidence.” The court asked defense counsel, “Is there anything else you want me to tell the jury about that issue?” Defense counsel replied, “No. [¶] . . . [¶] . . . We’re good.”

Voir Dire

At the start of voir dire, the trial court provided the following instruction: “In the trial in this case, each side is entitled to have a fair, unbiased, and unprejudiced jury. If there’s any fact or any reason why any of you might be biased or prejudiced in any way, it’s your duty to make this disclosure, and I do need to know about it. . . . If there’s any opinion or experience that any of you have had in the past that is so significant that it might interfere with your ability to be a fair and impartial juror as to this Defendant or as to the People in this particular case, I do need to know about it.” The court then asked the jurors a series of questions, including the following: “Do any of you as you sit here

have any belief or feeling toward any of the parties or attorneys or witnesses that would make it difficult or impossible for you to act fairly and impartially, both as to the People and the Defendant?” No one responded yes.

The court also asked: “It will appear to you that one or more of the parties, attorneys, or witnesses come from a particular national or religious group or may have a lifestyle different from your own. Would that in any way affect your judgment on the weight or credibility it would give to their testimony? I see no hands going up. [¶] [Defendant] obviously does not speak English as his first language. He is using an interpreter who speaks Pashto. Would the fact that [defendant] is using an interpreter and has a first language which is different than yours in any way affect you in rendering a decision in this case? Would any of you hold it against him? I see no hands going up.” The trial court also asked each of the potential jurors whether he or she would be “fair, impartial and unbiased” if selected to be on the jury, and each individual responded, “yes.”

Defense counsel did not ask specific questions of prospective jurors regarding whether they would be biased against defendant due to his ethnicity, religion, or need for a translator.

Jury Verdict and Sentencing

In May 2017, a jury found defendant guilty of infliction of corporal injury on a spouse (Pen. Code, § 273.5, subd. (a)),¹ criminal threats (§ 422), and battery against a cohabitant (§ 243, subd. (e)(1)). In bifurcated proceedings, the trial court found true a repeat offender enhancement as to the corporal injury count (§ 273.5, subd. (f)(1)), and

¹ Undesignated statutory references are to the Penal Code.

that defendant had a prior strike (§ 667, subds. (b)–(i)) and a prior serious felony conviction (§ 667, subd. (a)).

In June 2017, the trial court sentenced defendant to state prison to serve an aggregate term of 10 years 4 months, as follows: the low term of two years for the corporal injury charge and repeat offender enhancement doubled due to the strike (4 years total), 8 months consecutive for the criminal threats charge doubled due to the strike (16 months total), 6 months in county jail for the battery charge stayed pursuant to section 654, and 5 years consecutive for the prior serious felony conviction enhancement.

DISCUSSION

I

Defendant’s Clothing During Jury Selection

Defendant contends the trial court violated his equal protection and due process rights by requiring him to appear in jail clothes or be absent from jury selection. According to defendant, the trial court erroneously forced defendant to choose between waiving his right to be present during jury selection or his right to wear civilian clothes. Defendant further argues the relevant jury instruction was inadequate because it only told jurors they “should not” give the jail clothes consideration, rather than “must not.” We conclude defendant’s contentions are without merit.

A.

Defendant’s Constitutional Rights Were Not Violated

A trial court may not compel a defendant to stand trial while dressed in identifiable jail clothing because it may impair the presumption of innocence and accordingly deprive the defendant of his or her due process right to a fair trial. (*Estelle v. Williams* (1976) 425 U.S. 501, 503-505 [48 L.Ed.2d 126]; *People v. Taylor* (1982) 31 Cal.3d 488, 494.) Jail clothing “is a constant reminder to the jury that the defendant is

in custody, and tends to undercut the presumption of innocence by creating an unacceptable risk that the jury will impermissibly consider this factor.” (*Taylor*, at p. 494.) The right to wear civilian clothing “may be waived only expressly or by failure to make a timely objection to the defendant’s jail clothing.” (*Id.* at p. 501.) The waiver must be “ ‘an intentional relinquishment or abandonment of a known right or privilege.’ ” (*People v. Hetrick* (1981) 125 Cal.App.3d 849, 854.)

Although defense counsel initially indicated defendant would prefer to be absent from jury selection while counsel attempted to obtain civilian clothes for defendant for the afternoon session, defendant stated he preferred to be present. When the court explained defendant could be present but would be dressed in jail clothing until the afternoon session, defendant stated he understood and preferred to stay. “Yes, Your Honor. That’s okay,” defendant told the court. Under these circumstances, we conclude defendant chose to appear in jail clothing before the jury during the morning session of jury selection. The trial court did not err.

B.

Jury Instruction Was Proper

Defendant contends the trial court’s instruction regarding his jail clothing was inadequate to ensure that he received a fair trial. According to defendant, the instruction failed to dispel the prejudice of his prison garb because it instructed the jury that it “should not” give it any consideration, rather than “must not.” The People argue defendant forfeited the argument by failing to object to the instruction during trial. Regardless, we conclude defendant’s contentions are without merit.

Under section 1259, an appellate court may “review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby.” An instructional error affects a defendant’s substantial rights only if it is reasonably probable the defendant would have

obtained a more favorable outcome absent the error. (*People v. Elsey* (2000) 81 Cal.App.4th 948, 953, fn. 2; see *People v. Shoals* (1992) 8 Cal.App.4th 475, 490 [claim of instructional error pertaining to the elements of the crime is not forfeited by the failure to raise the issue in the trial court].)

Despite defendant's contentions, courts have upheld similar instructions. For example, in *People v. Daniels* (1991) 52 Cal.3d 815, the court upheld an instruction that the jury "should not consider in aggravation evidence of prior crimes other than those listed." (*Id.* at page 881.) The court reasoned that the instruction "properly limited the use of the prosecution evidence to proof of the circumstances of the crimes listed in the instruction or for which defendant was convicted, and barred use of that evidence to show additional crimes as aggravating circumstances." (*Ibid.*; see also *People v. Cuevas* (2001) 89 Cal.App.4th 689, 702 [finding proper an instruction that the jury "should not consider penalty or punishment"]; cf. *People v. Espinoza* (2016) 1 Cal.5th 61, 78 [finding trial court acted within its discretion to hold a trial in defendant's absence when the court instructed the jury that it "should not consider defendant's absence during any portion of the trial 'for any purpose in your deliberations' "].)

Similarly here, the trial court properly limited the jury's use of defendant's attire with the following instruction: "the fact that [defendant is] in jail clothing should not be considered by you in any way, shape, or form in reaching a decision in this case. Obviously a person charged with a crime is arrested and brought to trial. And you should make a determination in this case based only on the evidence, not on what people are wearing." Under the circumstances, there was no error.

II

Ineffective Assistance of Counsel

Defendant claims he received ineffective assistance of counsel. To succeed on such a claim, a defendant must prove that (1) trial counsel's representation was deficient

because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficiency resulted in prejudice to defendant, meaning “there is a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different” (See *People v. Mai* (2013) 57 Cal.4th 986, 1009; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687–688 [80 L.Ed.2d 674].)

A.

Counsel Failed to Provide Civilian Clothing or Request a Brief Continuance

Defendant contends his counsel was ineffective in failing to provide civilian clothing or request a brief continuance. We reject defendant’s contentions because defendant expressly agreed to appear before the jury in jail clothing. In addition, defendant cannot establish prejudice. The jury was instructed to disregard defendant’s jail clothing, and we assume a jury follows, understands, correlates, and correctly applies instructions. (See *People v. Carey* (2007) 41 Cal.4th 109, 130.)

B.

Counsel Did Not Voir Dire on Religious and Cultural Based Bias

Defendant contends his trial counsel was ineffective in failing to voir dire on religious and cultural based bias. According to defendant, his “religion, ethnicity, purported extreme and unreasonable views and language were all introduced at trial,” and “despite today’s political climate and public opinion, counsel asked no questions during voir dire that would expose a juror’s religious, ethnicity, or language based biases.”

Even if defense counsel had erred in failing to ask potential jurors about racial or cultural bias, defendant cannot establish prejudice because the trial court asked about these issues during voir dire. The trial court repeatedly emphasized the importance of juror neutrality and a fair trial. At the start of voir dire, the court instructed potential

jurors that each side was “entitled to have a fair, unbiased, and unprejudiced jury,” and it was the “duty” of the potential jurors to disclose “any fact or any reason why any of you might be biased or prejudiced in any way.” The court asked each of the potential jurors and alternates whether he or she would be “fair, impartial and unbiased” if selected to be on the jury, and each individual responded, “yes.” The court also asked whether any of the potential jurors had “any belief or feeling toward any of the parties or attorneys or witnesses that would make it difficult or impossible for you to act fairly and impartially,” and no one responded, “yes.”

In addition, the trial court asked questions designed to elicit whether any juror actually held cultural or religious bias. Noting that it was apparent “one or more of the parties, attorneys, or witnesses come from a particular national or religious group or may have a lifestyle different from your own,” the court asked whether it would “affect your judgment on the weight or credibility” of a party’s testimony; none of the potential jurors responded, “yes.” The court also addressed defendant’s use of a Pashto interpreter, asking whether it would “affect you in rendering a decision in this case?” or if any of the potential jurors would “hold it against him?” Again, no one responded, “yes.”

Under these circumstances, we conclude defendant has failed to establish he received ineffective assistance of counsel with respect to voir dire. (See *People v. Taylor* (1992) 5 Cal.App.4th 1299, 1316-1317 [rejecting as harmless error the defendant’s claim that trial court inadequately questioned potential jurors regarding racial bias, where trial court asked repeatedly and emphasized the importance of juror neutrality in a fair trial and counsel was apparently satisfied it was unnecessary to inquire further].)

C.

Counsel Did Not Object to the Prosecutor's Questions Regarding Defendant's Statements Included in the Victim's January 2016 Letter to Osborne

Defendant contends his counsel was ineffective in failing to object to the prosecutor's questions regarding the victim's letter to Osborne in January 2016 that detailed her argument with defendant over the subsidized housing application. According to defendant, the questions regarding his statements that "women don't have rights in Islam" and it was "okay to steal from the non-believers" were highly prejudicial, and counsel should have requested they be excluded under Evidence Code section 352.

Even if defense counsel erred in not objecting to the admission of the victim's statements in the letter, defendant cannot establish there was a reasonable probability the result would have been different. The comments were made in passing during the victim's testimony and merely provided context to the relationship and argument between defendant and the victim. Neither the prosecutor nor defense counsel mentioned the comments during closing argument, and they did not go to defendant's central argument at trial, namely that the victim made up the domestic abuse allegations to get her husband into trouble and deported. Because defendant cannot establish prejudice, his claim of ineffective assistance of counsel fails.

III

Prior Serious Felony Enhancement

Defendant's sentence includes a five-year prior serious felony enhancement pursuant to section 677, subdivision (a). At the time defendant was sentenced, the court had no discretion to strike such an enhancement. (See former § 667, subd. (a) (as approved by voters, Gen. Elec. (Nov. 7, 2012)); former § 1385, subd. (b) (Stats. 2014, ch. 137, § 1).)

Senate Bill 1393, that went into effect on January 1, 2019, amends sections 667, subdivision (a) (Stats. 2018 (2017 – 2018 Reg. Sess.) ch. 423, § 64), and 1385, subdivision (b) (Stats 2018 (2017 – 2018 Reg. Sess.) ch. 1013, § 2), to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony allegation for sentencing purposes.

Defendant argues the amendments apply retroactively to his case, which is not yet final. He asks us to remand the matter for the trial court to exercise its new discretion and consider striking the prior serious felony enhancement. The People concede, and we agree.

Unless there is evidence to the contrary, it is reasonable to infer amendments to statutes that either reduce the punishment for a crime or vest in the trial court the discretion to impose a lesser penalty, such as Senate Bill 1393, apply to all defendants whose judgments are not final as of the amendment's effective date. (*In re Estrada* (1965) 63 Cal.2d 740, 742; *People v. Garcia* (2018) 28 Cal.App.5th 961, 972-973.) There is nothing in the amendment suggesting the Legislature intended it to apply prospectively only, so the act applies retroactively to this case.

The trial court imposed the low term on the principal count. During the sentencing hearing, the court stated it “will stay by the lower base term even though a strong contention could be made the middle base term is appropriate. I’m going to take into consideration the wishes of the victim and lower base term.” The trial court did not clearly indicate it would have declined to exercise discretion to lessen defendant’s sentence. Accordingly, the appropriate remedy is to remand the matter. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425 [“remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken a firearm enhancement”].)

Given our conclusions, we reject defendant's argument that reversal is required due to cumulative error.

DISPOSITION

The matter is remanded to the trial court to consider exercising its discretion under Penal Code sections 667 and 1385 to strike the prior serious felony conviction enhancement. After exercising this discretion, if appropriate, the trial court is directed to prepare an amended abstract of judgment reflecting its judgment and to forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

_____/s/
HOCH, J.

We concur:

_____/s/
BLEASE, Acting P. J.

_____/s/
RENNER, J.